90-1310

No.

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

CLARENCE DAVID KARNES - - - Petitioner

versus

UNITED STATES OF AMERICA - - -Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

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QUESTION PRESENTED

Did the Trial Court err in sentencing Clarence David Karnes under both the Bank Robbery Statute, 18 U.S.C. § 2113(d) and under the statute which prohibits the use of a firearm in the commission of a felony, 18 U.S.C. § 924(c)?

PARTIES

The parties herein

The United States of America, Plaintiff
Clarence David Karnes, Defendant

TABLE OF CONTENTS

	PAGE
Questions Presented	i
The Parties	i
Table of Contents	ii
Table of Citations	iii
Opinions Below	1
Jurisdiction	1- 2
Statement of the Facts	2
Arguments	3- 7
Conclusion	8
Appendix	1a-6a

TABLE OF CITATIONS

Statutes and Rules: PAGE

18 U.S.C. § 2113(d) i
18 U.S.C. § 924(c) i
18 U.S.C. § 2113(a) 2
18 U.S.C. § 924(a) 2
18 U.S.C. § 924(c)(1) 2
28 U.S.C. § 2255 2

Cases:

Busic v. *U.S.*, 100 S.Ct.. 1747, 446 U.S. 398, 641 L.Ed.2d 381 (1980) 4
Simpson v. *U.S.*, 98 S.Ct. 909, 435 U.S. 6, 55 L.Ed.2d 70 (1978) 4
Rewis v. *U.S.*, 401 S.Ct. 808, S.Ct. 1056, 28 L.Ed.2d 493 (1971) 4
U.S. v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 73 S.Ct 227, 97 L.Ed.2d 260 (1952) 4
McBoyle v. *U.S.*, 283 U.S. 25, 52 S.Ct. 340, 75 L.Ed. 816 (1931) 4– 5
U.S. v. *Brass*, 404 U.S. 336, 30 L.Ed.2d 488, 92 S.Ct. 515 (1971) 5
Preises v. *Rodriguez*, 411 U.S. 475, 36 L.Ed.2d 439, 93 S.Ct. 1827 (1973) 5
Grimes v. *U.S.*, 607 F.2d 6 (2nd Cir., 1979) 5
Dorris v. *U.S.*, 417 U.S. 333, 94 S. Ct. 2298, 41 L.Ed. 2d 109 (1974) 5
Wright v. *U.S.*, 519 F. 2d 13 (7th Cir., 1975) 5
O'Clair v. *U.S.*, 470 F.2d 1199 (1st Cir., 1982) 412 U.S. 921, 93 S.Ct. 2741, 37 L.Ed.2d 148 (1973).. 5
Walters v. *Harris*, 460 F.2d 988 (4th Cir., 1982), 409 U.S. 1129, 93 S.Ct. 947, 35 L.Ed.2d 262 (1973) .. 5
United States v. *Nelson*, 574 F.2d 277 (5th Cir. 1978) 5
U.S. v. *Ivy*, 644 F.2d 479 (5th Cir., 1981) 7
U.S. v. *Larson*, 625 F. 2d 67, 69 (5th Cir., 1980) ... 7
Chandler v. *U.S.*, 468 F.2d 834 (5th Cir., 1972) 7

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

CLARENCE DAVID KARNES - - - - *Petitioner*

v.

UNITED STATES OF AMERICA - - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals is unreported and is reproduced in the Appendix hereto. The judgment of the District Court is unreported and is included in the Appendix hereto.

JURISDICTION

The nature of this Petition is to challenge the validity of the sentence rendered pursuant to the Federal Sentencing Guidelines and the conflict between the statutes and the circuit courts in reconciling the Bank Robbery Statute, 18 U.S.C. § 2113(d) and the statute which prohibits the use of a firearm in the commissions of a felony, 18 U.S.C. § 924(c).

The judgment sought to be reviewed is that of the Sixth Circuit Court of Appeals in *The United States of America* v. *Clarence David Karnes* entered November 21, 1990 (Circuit Court Case 90-5556), not officially reported.

Notice of Appeal was filed January 7, 1991, by mail.

The jurisdiction of the Supreme Court of the United States is conferred by Rule 19 of the Supreme Court of the United States and 28 U.S.C. 1254(1).

STATEMENT OF THE FACTS

The Appellant, Clarence David Karnes, was indicted on October 2, 1989, and charged in a three count indictment with violation of 18 U.S.C. § 2113(a) bank robbery; 18 U.S.C. § 2113(d) use of a deadly weapon in the commission of a bank robbery and 18 U.S.C. § 924(c) use of a firearm in the commission of a felony.

Arraignment subsequent to indictment was held on October 17, 1989, where a plea of not guilty was entered.

On November 13, 1989, David Karnes withdrew his plea of not guilty and entered a plea of guilty to counts 2 and 3 of the indictment, those being counts alleging violation of 18 U.S.C. § 2113(d) and 18 U.S.C. §924(c)(1).

On January 23, 1990, David Karnes was sentenced to 24 months on the 18 U.S.C. § 2113(d) count of the indictment and five years on the 18 U.S.C. § 924(c) count of the indictment.

Motion to Remedy Sentence Pursuant to 28 U.S.C. § 2255 was filed March 30, 1990.

Appellant contends that the sentence rendered was in violation of the law, being a violation of the Fifth Amendment of the Constitution of the United States.

ARGUMENT

The Trial Court Erred in Sentencing Clarence David Karnes under Both the Bank Robbery Statute, 18 U.S.C. § 2113(d) and under the Statute which Prohibits the Use of a Firearm in the Commission of a Felony. U.S.C. § 924(c).

The bank robbery statute 18 U.S.C. § 2113(d) reads as follows:

> Whoever in committing or attempting to commit any offense defined in subsections (a) and (b) of this section, assaults any person by use of a dangerous weapon or device shall be fined not more than $10,000.00 or imprisoned not more than twenty five years or both.

In the case before the court the conflict between 18 U.S.C. § 2113(d) the bank robbery statute and 18 U.S.C. § 924(c) is presented for review.

The problem arises when the United States as in this case enhances a § 2113(d) conviction with a § 924(c) conviction. The problems with this enhancement are twofold. First, 18 U.S.C. § 2113(d) is a specific statute applying to bank robbery, carrying specific enhancements for use of a deadly weapon in the commission of a bank robbery, while the conflicting statute 18 U.S.C. § 924(c) is a general statute applying to the use of a firearm during the commission of a federal felony. Second is the question of double jeopardy because 18 U.S.C. § 2113(d) and 18 U.S.C. § 924(c)(1) both require proof of identical elements during the commission of a bank robbery. In such cases the penalties are multiplicitous.

Precedent is available to provide guidance for these arguments.

The Supreme Court reviewed the question in *Busic* v. *U.S.*, 100 S.Ct. 1747, 446 U.S. 398, 641 L.Ed.2d 381 (1980). In *Busic, supra,* it was held that 18 U.S.C. § 924(c) cannot be applied to a criminal defendant who uses a firearm in the commission of a felony that is proscribed by a statute which itself authorizes enhancement if a dangerous weapon is used. Pursuant to this case, the sentence of such defendant may only be enhanced under the enhancing provisions of the felony committed by that defendant. The case further speaks to and addresses the question of the apparent ambiguity between the two statutes with the general rule that ambiguity in criminal statutes be resolved in favor of leniency.

The case also follows the general rule that where a general statute conflicts with a specific statute, the terms of the specific statute take precedence.

In deciding the *Busic* case, the Supreme Court was upholding its ruling in *Simpson* v. *U.S.*, 98 S.Ct. 909, 435 U.S. 6, 55 L.Ed.2d 70 (1978) which had been handed down two years previous. In the *Simpson* case, the Court reviewed and upheld the general rule that where there is a conflict between a general statute and a specific statute (18 U.S.C. § 924(c)), the terms of the specific statute would prevail, and further that such was true even in instances where the specific statute predated the general statute.

With regard to the question of ambiguity in statutory language of criminal statutes, the Court has consistently held that such ambiguity should be resolved in favor of leniency. See: *Rewis* v. *U.S.*, 401 U.S. 808, S.Ct. 1056, 28 L.Ed.2d 493 (1971); *U.S.* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 73 S.Ct. 227, 97 L.Ed. 260 (1952); *McBoyle*, v. *U.S.*, 283 U.S. 25, 52 S.Ct. 340, 75 L.Ed. 816

(1931); *U.S.* v. *Brass,* 404 U.S. 336, 30 L.Ed.2d 488, 92 S.Ct. 515 (1971).

With regard to the statement that where there is a conflict between a general statute and specific statute, the terms of the specific statute should control. See also: *Preises* v. *Rodriguez,* 411 U.S. 475, 36 L.Ed.2d 439, 93 S.Ct. 1827 (1973).

The use of 18 U.S.C. § 924(c) to enhance convictions pursuant to 18 U.S.C. § 2113(d) violate the rights of the defendant as guaranteed by the Fifth Amendment to the Constitution of the United States of America which guarantees that an individual shall face double jeopardy for the same crime.

In *Grimes* v. *U.S.,* 607 F. 2d 6 (2nd Cir., 1979) the Court held that convictions for bank robbery and armed bank robbery may not be entered when those convictions arise out of a single transaction. The Court further held that the government could not prosecute a defendant under 18 U.S.C. § 924(c) for use of a firearm to commit a felony when the underlying felony, armed bank robbery is prosecutable under 18 U.S.C. § 2113(d). See also: *Dorris* v. *U.S.,* 417 U.S. 333, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974); *Wright* v. *U.S.,* 519 F.2d 13 (7th Cir., 1975); *O'Clair* v. *U.S.,* 470 F.2d 1199 (1st Cir., 1982), cert. denied 412 U.S. 921, 93 S.Ct. 2741, 37 L.Ed.2d 148 (1973).

For further support of the position that judgment of convictions entered under 18 U.S.C. § 2113(a) and 18 U.S.C. § 924(c) are subject to collateral attack on the basis of significant constitutional defects, See: *Walters* v. *Harris,* 460 F. 2d 988 (4th Cir., 1982) cert. denied, 409 U.S. 1129, 93 S.Ct. 947, 35 L.Ed.2d 262 (1973).

In *United States* v. *Nelson,* 574 F. 2d 277 (5th Cir., 1978) the court determined that when a individual involved

in the single transaction of a bank robbery with firearms was sentenced to separate terms under the same statute allowing for the enhancement of punishment for bank robbery when the robbery is committed by use of a dangerous weapon and a statute providing that whoever uses a firearm to commit a felony shall be subject to have the latter sentence vacated. The Court in that case rules that the two crimes involve proof of the same elements and therefore run afoul of double jeopardy.

The position of the appellant in this appeal seems to be supported by the legislative history of 18 U.S.C. § 924(c). The sponsor of the law in the House of Representatives, Representative Poff stated on the floor of the house:

> For the sake of legislative history it should be noted that my substitute is not intended to apply to Title 28, § 111, 112 or 113 which already define the penalties for use of firearms in assaulting officials, with § 2113 or § 2114 concerning armed robberies of the mail or banks. . . . 114 *Congressional Record*, 2223 (1968).

While there have been some changes in the statutes involved, the treatment of sentencing involving these offenses should remain as in the past. The intent in this area is clearly shown by the promulgation of 2B3.1 of the Sentencing Guidelines which specifically applies to sentencing involving instances where a firearm is used in the commission of a bank robbery

The policy statement of the Sentencing Commission states that Congress first sought honesty in sentencing and second sought uniformity in sentencing.

The only way to assure that these objections will be met is to require that under similar circumstances where there is a conflict within the law, the prosecutors and the court to follow the specific guideline for the offense in question.

If this had not been the intent within the guidelines, there would have been no reason for the promulgation of Sentencing Guideline 2B3.1(2). All firearm related offenses under 18 U.S.C. § 2113(d) would be treated pursuant to Sentencing Guideline 2K2.4.

The only way to give sense and meaning to 2B2.1(2) of the Sentencing Guidelines pursuant to the policy statement of the guidelines is to require that 2B3.1(2) alone should be applied to convictions under 18 U.S.C. § 2113(d) standing.

The conviction and sentence under 18 U.S.C. § 924(c) must be vacated, with the conviction and sentence pursuant to 18 U.S.C. § 2113(d) standing.

That sentence having been give for violation of 18 U.S.C. § 2113(d) by the court, may not now be reviewed and enhanced by the Court. See: *U.S.* v. *Busic,* 639 F. 2d 940 (3rd Cir., 1981); *U.S.* v. *Ivy,* 644 F.2d 479 (5th Cir., 1981); *U.S.* v. *Larson,* 625 F.2d 67, 69 (5th Cir., 1980); *Chandler* v. *U.S.,* 468 F. 2d 834 (5th Cir., 1972).

In the case before this Court, it is very clear that there was on bank robbery in which the defendant, now appellant, David Karnes, used a weapon. David Karnes was charged for that one bank robbery in a multiple count indictment of violating 18 U.S.C. § 2113(a); 18 U.S.C. §2113(d) and 18 U.S.C. §924(c). Appellant for this one bank robbery pleaded guilty to 18 U.S.C. § 2113(d) and 18 U.S.C. § 924(c). These statutes are ambiguous and conflicting. Pursuant to the law, as stated and interpreted hereinabove, Karnes should constitutionally only have been allowed to plead guilty only to violation of 18 U.S.C. § 2113(d). The pleading and sentencing under both statutes is contrary to both the statutory law and the Constitution of the United States.

CONCLUSION

The conviction of appellant, Clarence David Karnes, pursuant to 18 U.S.C. § 924(c) must be vacated.

Respectfully submitted,

MICHAEL L. BOYLAN
807 W. Market Street
Louisville, Kentucky 40202
(502) 581-9206

Counsel for Petitioner

APPENDIX

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Case Number CR-89-00079-01-L

UNITED STATES OF AMERICA	Mr. Scott Cox,
v.	Assistant U.S. Attorney
CLARENCE DAVID KARNES	Mr. Grant Helman, Retained
(Name of Defendant)	Defendant's Attorney

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

INDICTMENT

THE DEFENDANT:

☒ pleaded guilty to count(s) 2 and 3 of the Indictment on 11/13/89

☐ was found guilty on count(s) _____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
18:USC:2113(d)	placing lives in jeopardy while in the process of robbing F.S. L.I.C. insured bank	2
18:USC:924(c)(1)	using firearm during bank robbery	3

The defendant is sentenced as provided in pages 2 through 5 of the judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984, and pursuant to a plea agreement.

☐ The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).

☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.

☐ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

☒ It is ordered that the defendant shall pay to the United States a special assessment of $100.00, which shall be due immediately. ($50,00 as to each of Counts 2 and 3 of the Indictment, said $100.00 fee to be paid on this date to the United States District Court Clerk.)

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:

360-48-9748

January 22, 1990
Date of Imposition of Sentence

Defendant's mailing address

P.O. Box 121
Betty Lane
Leitchfield, KY 42754

Thomas A. Ballantine, Jr.
Signature of Judicial Officer
Thomas A. Ballantine, Jr.
United States District Judge
Name & Title of Judicial Officer

Defendant's residence address:

(Same as above)

January 22, 1990
Date

No. 90-5556

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee,*

v.

CLARENCE DAVID KARNES, - - *Defendant-Appellant.*

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a preceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

ORDER—Filed November 21, 1990

BEFORE: KRUPANSKY, GUY and SUHRHEINRICH, Circuit Judges.

Clarence David Karnes, a federal prisoner, appeals the district court's order denying his motion to vacate sentence filed pursuant to 28 U.S.C. § 2255. The case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination of the record and briefs, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Pursuant to a plea agreement, Karnes pled guilty to one count of placing lives in jeopardy in the process of robbing an FSLIC insured bank, in violation of 18 U.S.C. § 2113(d), and one count of using a firearm in the commission of a felony, in violation of 18 U.S.C. § 924(c)(1). He received consecutive sentences of twenty-four and sixty months, respectively. Thereafter, Karnes filed his § 2255 motion asserting that he should not have received an additional

sentence under 18 U.S.C. § 924(c) for using or carrying a firearm during the commission of the bank robbery, because the bank robbery statute, 18 U.S.C. § 2113(d), and the applicable sentencing guidelines, *see* U.S.S.G. § 2B3.1, include a specific enhancement for the use of a dangerous weapon. Following a review of the record, the district court denied Karnes's § 2255 motion. Karnes has filed a timely appeal.

Upon review, we shall affirm the district court's judgment because Karnes's assertions of error are meritless. The imposition of consecutive sentences for violations of 18 U.S.C. § 2113(d) and 18 U.S.C. § 924(c)(1) does not violate the double jeopardy provision of the Federal Constitution. *See United States* v. *Harris*, 832 F.2d 88, 90-91 (7th Cir. 1987) (per curiam); *United States* v. *Browne*, 829 F.2d 760, 766-67 (9th Cir. 1987), *cert. denied*, 485 U.S. 991 (1988). *Accord United States* v. *Shavers*, 820 F.2d 1375, 1977-78 (4th Cir. 1987); *United States* v. *Ricks*, 817 F. 2d 692, 698-99 (11th Cir. 1987); *United States* v. *Doffin*, 791 F.2d 118, 120-21 (8th Cir.) (per curiam), *cert. denied*, 479 U.S. 861 (1986). Further, a review of the record convinces us that the district court properly applied the applicable sentencing guidelines. *See* U.S.S.G. §§ 2B3.1, 2K2.4.

Accordingly, the district court's judgment is hereby affirmed. Rule 9(b)(5), Rules of the Sixth Circuit.

Entered by Order of the Court

(s) Leonard Green
Clerk

Mandate Issued: December 13, 1990

No Costs Taxed

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Criminal Action No. CR 89-00079-01-L(B)

UNITED STATES OF AMERICA - - - - - - *Plaintiff*

v.

CLARENCE DAVID KARNES - - - - - - *Defendant*

ORDER—Entered April 6, 1990

On motion of the defendant to remedy sentence, and the United States having responded thereto, and the Court being otherwise sufficiently advised,

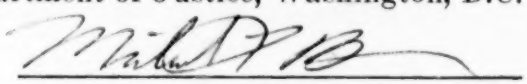
IT IS HEREBY ORDERED that the defendant's Motion is OVERRULED.

Dated: 4/6/90

(s) Thomas A. Ballantine, Jr.
Judge, United States District Court

CERTIFICATION

It is certified that a copy of the Petition for a Writ of Certiorari to the Sixth Circuit Court of Appeals was mailed this 13 day of February, 1991, to Hon. Terry M. Cushing, Assistant U.S. Attorney, 510 W. Broadway Street, 10th Floor, Louisville, Kentucky 40202, Counsel for Respondent, Mr. Alexander L. Stevas, Clerk, Supreme Court of the United States, Washington, D.C. 20543; and Office of the Solicitor General, Department of Justice, Washington, D.C. 20530.



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